No. 15,823

United States Court of Appeals
For the Ninth Circuit

ERIC SOBY, d/b/a SOBY PAINTING CO., and UNITED STATES FIDELITY AND GUARANTY COMPANY, *Appellants*

vs.

LLOYD W. JOHNSON and MAX J. KUNEY, d/b/a KUNEY JOHNSON COMPANY, *Appellees.*

APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF ALASKA, THIRD DIVISION

THE HONORABLE J. L. McCARREY, JR.
United States District Judge

BRIEF OF APPELLEES

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THE ARGUS PRESS, SEATTLE

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STATUTES

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JURISDICTION

There is no issue as to either the jurisdiction of the District Court or of this court, and appellees accept the appellants' statement as to jurisdiction contained on pages 1 and 2 in appellants' brief.

STATEMENT OF THE CASE

Appellees are unable to accept appellants' statement of the case.

In October and November, 1952, appellees entered into two construction contracts with the United States of America. Contract No. DA-95-507-eng-384 was for construction of 14 buildings, each providing for 8 family

units, or a total of 112 apartments at Ladd Air Force Base, Fairbanks, Alaska (Ex. 1). Contract No. DA-95-507-eng-385 was for the construction of 5 three-story airmen dormitory buildings and 1 one-story mess and administration combination building at Eielson Air Force Base, Fairbanks, Alaska (Ex. 2).[1]

Appellant Eric Soby entered into subcontracts with appellees to furnish all labor, material, equipment and services required to perform the taping and spackling of the sheet rock and the painting required on both of the prime contracts. Soby's contract price on the Ladd contract was $109,113.00 and on the Eielson installations subcontract earnings at completion were $78,-336.90, including the extra work (Exs. 13 (1 and 2), II).

The appellant United States Fidelity and Guaranty Company[2] was surety for Soby under both of his contracts (Exs. A, B).

Soby commenced performance under his two subcontracts in the spring of 1953. Although he was an experienced painter he had not previously undertaken contracts as large as the subcontracts herein. Soby was confronted with labor problems on these contracts on at least three occasions and with a complete lack of adequate and competent supervision in the performance of his subcontract at Ladd, resulting in poor workmanship and the subsequent rejection of his work by the government inspectors in the fall of 1953 (Tr. 90, 91).

[1] Throughout the trial the Ladd contract was referred to as "384" and the Eielson contract as "385." Such designations will be used herein, or alternately "Ladd" and "Eielson."

[2] Hereafter referred to as "U. S. F. & G."

In November, 1953, appellees were compelled to advance funds to Soby so he could meet his payrolls, which advances were approved in writing by U. S. F. & G. (Tr. 91, Ex. EE).

When none of the buildings on the Ladd project were completed to the satisfaction of the government,[3] two representatives of U. S. F. & G. inspected the Ladd and Eielson projects in December, 1953. Thereafter, on December 10, 1953, appellees were assured that competent help would be obtained to complete the subcontracts to the satisfaction of the government (Tr. 91). However, during their inspection trip, representatives of U. S. F. & G. contacted other painters in Fairbanks in an effort to determine how much it would cost to finish the work (Tr. 58, 1271).

Subsequent thereto, without consulting the appellees and without their knowledge, one of the representatives of U. S. F. & G. ordered and directed Soby to cease work on both the Ladd and Eielson projects, whereupon he wilfully and voluntarily abandoned both contracts on December 19, 1953 (Tr. 61, 92, 1441, 1442). The District Court's Finding of Fact in this regard is not an issue on this appeal (Tr. 92).

Mr. Murray, a U. S. F. & G. representative, admitted to the appellee Lloyd Johnson that he had changed his mind on keeping Soby on the job, and requested that appellees obtain a competent painting contractor to complete the work, but asked that the new painter not start until after the pending Christmas holidays (Tr.

[3] As required by appellees' contracts 384 and 385 with the government (Exs. 1(1), 2(1).)

59, 1443). This conversation was confirmed by a letter to Kuney Johnson Company from Mr. Murray dated December 23, 1953, in which he stated:

> "Mr. Johnson in a telephone conversation with the writer at Fairbanks tendered the completion of the contracts to the U. S. F. & G., and this letter is to confirm such tender and also our regretful inability to accept the tender. Therefore, this leaves you free and without prejudice to complete the contracts and to tender to us the claim of the cost of the completion over and above the contract prices involved." (Ex. DD, Tr. 1443).

Representatives of U. S. F. & G. and the appellees held a conference on December 29, 1953, following which there was an immediate exchange of letters and in U. S. F. & G.'s letter dated December 31, 1953, the employment of Harold Larsen, d/b/a Larsen Brothers Painting Co., to complete the painting subcontracts in accordance with appellees' proposal, was expressly approved (Exs. J, J(a)). Larsen's superintendent was one of the painting contractors interviewed by the U. S. F. & G. representatives on their inspection trip in December, 1953 (Tr. 1271).

Larsen commenced work January 4, 1954 (Ex. 36) and entered into a written contract to complete the painting, taping and spackling work required to obtain government acceptance of the projects. Larsen was to be compensated for his actual labor and material costs, plus a fee of 10% of the labor cost only (Ex. C). This percentage was not computed on the cost of materials and no overhead or profit was charged to Soby for the benefit of appellees (Ex. C, Tr. 1510). The damages

awarded appellees for the cost of completing Soby's unfinished work were solely direct field costs and interest thereon (Tr. 1511, Ex. II).

By his Amended Complaint Soby sought damages not upon his subcontracts, but upon the theory of *quantum meruit* (Tr. 26, 477), claiming his work had been damaged by appellees using improper materials on the Ladd project (no such claim was made with reference to the Eielson project). This issue was decided in appellees' favor and is not now challenged on this appeal.

The Appellees' Second Amended Answer and Cross-Complaint is an action for breach of contract seeking damages because of the costs expended in completing Soby's unfinished work (Tr. 34). The Second Affirmative Defense and Cross-Complaint therein (Tr. 38) is the only pleading material to the first issue raised by appellants,[4] wherein appellants challenge the amount found to have been expended to complete Soby's unfinished work on the Eielson contract (Tr. 38). The District Court found that appellees' damages were amply supported by the evidence (Tr. 94), and were documented by payroll records, invoices, government inspectors' reports, and correspondence, all of which were admitted without objection. The judgment was for the exact amount prayed for by appellees, which amount was fully ascertained prior to the commencement of the trial, and which amount was readily available and known to appellants because weekly invoices were mailed to both Soby and U. S. F. & G. as the expenditures were made (Ex. F, Tr. 1505).

[4] Appellants' Brief, page 21, hereafter abbreviated "App. Br."

When Soby abandoned his contracts he voluntarily left supplies, materials and equipment at the respective job sites. These items were used by appellees in an endeavor to reduce costs, as the same items would have been purchased by Larsen Brothers Painting Co. had Soby removed them (Tr. 1515). At the completion of the work in the spring of 1954, the remaining items were tendered to Soby (Ex. CC). The tender was not accepted and appellees sold the items to another painting contractor for $616.00, which sum was credited to Soby (Ex. II, Tr. 45).

Appellants' Statement of Points covered almost every facet of the litigation and necessitated the printing of this record totaling 1815 pages, the greater portion of which related to the issues raised by Soby's Amended Complaint.

By the Statement of Issues presented and Specification of Errors in their brief, pages 18 to 20 inclusive, appellants have abandoned their appeal from that portion of the Judgment of the District Court denying recovery to Soby and have abandoned their appeal as to appellees' Judgment relating to the cost of completing the job at Ladd. Therefore, a major portion of the Transcript of Record is immaterial.

This appeal relates solely to appellees' Judgment for the cost of completing appellant Soby's work at Eielson; interest allowed appellees upon both cross-complaints from September 1, 1956, to the date of judgment; and the matter of the $3,000.00 offset which the District Court allowed for Soby's inventory.

SUMMARY OF ARGUMENT

Upon Soby's wilful and voluntary abandonment of his subcontracts, appellees were required to complete the unfinished work at Eielson to the satisfaction of the government, and as a result thereof appellants are liable for the necessary expenditures, which were established in every detail.

Appellees are entitled to recover the costs of completing the unfinished work to the satisfaction of the government as a result of Soby's abandonment.

All of appellees' costs were necessary expenditures, which were substantiated in detail.

Appellants were unable to rebut the accuracy of the completion costs, although they had ample opportunity to do so.

Appellants' inferences of "featherbedding and collusion" predicated upon a government percentage of completion estimate (Ex. 46(2)) are without substance, and appellants' computations in support of such inferences are incorrect.

Appellees' reasonable costs expended in completing the unfinished work, following Soby's abandonment, were not only liquidated but ascertainable as soon as such costs were incurred, and the District Court did not err in awarding interest on such sums.

The $3,000.00 inventory credit allowed by the District Court (increasing the credit allowed Soby by appellees from the figure of $616.00) was well within the evidence.

ARGUMENT

1. Upon Soby's Wilful and Voluntary Abandonment of His Subcontracts, Appellees Were Required to Complete the Unfinished Work at Eielson to the Satisfaction of the Government, and as a Result Thereof Appellants Are Liable for the Necessary Expenditures, Which Were Established in Every Detail.

(a) ***Appellees are entitled to recover the costs of completing the unfinished work to the satisfaction of the government as a result of Sody's abandonment.***

Appellants' brief expressly concedes that Soby wilfully abandoned his subcontracts without cause.[5]

Appellee's damages are measured by the actual loss incurred as a natural and proximate consequence of the unjustified abandonment, which in this case is the sum appellees were compelled to pay the Larsen Brothers Painting Company, plus their own added field costs, to complete the unfinished painting subcontracts.

In *United States v. Behan,* 110 U.S. 338, 28 L.ed. 168, 4 S.Ct. 81 (1884), it was found that the government had wrongfully terminated a construction contract. The Supreme Court held the measure of damages for the breach of contract was the amount of the loss and expenditures which the injured contractor had sustained in the fair endeavor to perform his contract. The court further held that if such expenditures were foolishly and unreasonably incurred, it must be proved by the party making such allegations, as such matters are not to be presumed.

In 25 C.J.S., Sec. 79, p. 580, "Damages," the rule is stated as follows:

[5] (App. Br. p. 27).

> "The damages for failure to furnish labor or services in accordance with a contract therefor are measured by the actual loss sustained as a natural and proximate consequence, which, when the contract is to perform a specific piece of work or service, is ordinarily the reasonable cost of securing performance by other means. . . . "

In *Associated Lathing and Plaster Co. v. Louis C. Dunn, Inc.,* 135 Cal.App.(2d) 40, 286 P.(2d) 825 (1955), it was held that a general contractor was entitled to recover as damages the difference between the price for which the subcontractor agreed to do the work and the reasonable cost of completing the job by the second lowest bidder.

See also *American Can Co. v. Garnett,* 279 Fed. 722, 727 (9th Cir. 1922), wherein the court stated:

> "The defendant having wrongfully put an end to the contract and, having prevented the plaintiff from performing it, is estopped to deny that the latter is damaged to the extent of his actual loss and outlay fairly incurred,"

citing *United States v. Behan, supra.*

(b) ***All of appellees' costs were necessary expenditures, which were substantiated in detail.***

The District Court made an express finding that appellees had properly expended the reasonable sum of $53,955.43 (which included interest to September 1, 1956) to complete the Eielson contract (Tr. 94).

In the District Court's oral opinion, it mentioned the fact that all payrolls and other expenses of the Larsen Brothers Painting Company were supported by can-

celled checks, invoices and correspondence (Tr. 68). The exhibits establishing appellees' damages were admitted into evidence without objection. They are as follows:

Exhibit C—Larsen invoices (Tr. 22).

Exhibit D—Larsen's foremen's time cards (Tr. 22).

Exhibit E—Larsen and Kuney Johnson's payrolls December 28, 1953 to June 26, 1954 (Tr. 22).

Exhibit F—Kuney Johnson invoices to Soby Painting Company November 10, 1953 to April 30, 1954 (Tr. 22).

Exhibit G—Kuney Johnson check vouchers November 16, 1953 to March 4, 1954 (Tr. 22).

Exhibit H—Requisition book showing material purchases during Larsen's performance (Tr. 22).

Exhibit I—Including interest paid to April 30, 1954.

Exhibit II — Itemization of appellees' cross-complaints (Tr. 1505).

Exhibit JJ—Detailed proof and analysis of cross-complaints (Tr. 1511).

Exhibit 36—Inspectors' daily reports showing work performed each day by Larsen Brothers Painting Company (Tr. 23).

Harold Larsen testified that his contract with appellees was entirely reasonable (Tr. 903), that his objective was to clean the job up as cheaply and reasonably as possible (Tr. 943).

Tom Corbett, superintendent for Larsen, and Harold

Stenson, general superintendent for appellees, both testified that all of the work performed by the Larsen Brothers Painting Company was necessary to complete the Eielson project (Tr. 1280, 1136).

Max J. Kuney testified that he instructed his Alaska office to bill Soby Painting Company actual direct field costs, without overhead, without profit and without markup. This was done and each week a statement was mailed to each of appellants (Tr. 1504-1505, Ex. F).

It is difficult to understand how proof of damages such as those contained in appellees' second cross-complaint could have been more detailed. The same method of proof, and in fact the same testimony and exhibits, established appellees' first cross-complaint, and the Judgment of the District Court awarded thereon, from which no appeal has been taken.

(c) ***Appellants were unable to rebut the accuracy of the completion costs, although they had ample opportunity to do so.***

Appellants offered no rebuttal testimony to refute appellees' proof of the work required subsequent to January 1, 1954 to complete the painting subcontract on the Eielson project to the satisfaction of the government. Had appellees' proof not been completely accurate, appellants could have offered rebuttal evidence. Soby, his superintendents, and government personnel, all had actual knowledge of the job progress, as did Mr. Douglas, the representative of U. S. F. & G., who investigated Soby's work in December, 1953, and Victor C. Rivers, the professional engineer, who investigated

the Ladd and Eielson projects in February, 1954, upon behalf of Soby (Tr. 1636). The irrefutable conclusion is that appellees' evidence was completely accurate.

As stated in *United States v. Behan, supra,* a contention that expenditures to complete a contract are unreasonable must be proved, as such matters will not be presumed. Appellees do not deem it necessary to cite any authority for the proposition that allegations of fraud must be pleaded and cannot be raised for the first time on appeal.

In *Elias v. Wright,* 276 Fed. 908 (2d Cir., 1921), a general contractor was awarded judgment against a subcontractor for failing to perform. The court held that the general contractor was entitled to recover such reasonable sum expended for the purchase of material and services necessary for the completion of the subcontractor's work, or as is sometimes stated, the difference between the contract price and the actual price of completion of the work required. As to the percentage of overhead the general contractor was entitled to recover, the court stated in affirming the award made, that the subcontractor had the opportunity at the trial to refute, either with testimony or cross-examination, that such a charge was unreasonable.

For a case approving expenditures analogous to those in the instant case, see *Gulf States Creosoting Co. v. Loving,* 120 F.(2d) 195 (4th Cir. 1941).

(d) ***Appellants inferences of "feather-bedding and collusion" predicated upon a government percentage of completion estimate (Ex. 46(2)) are without substance, and appellants' computations in support of such inferences are incorrect.***

Since it is impossible for appellants to attack appellees' testimony in support of damages, they infer more work was done than required and base their sole argument upon an alleged percentage of completion figure as of December 31, 1953 which appears on a government report (Ex. 46(2)). This percentage figure was a government estimate relating to payment schedules and pertained to a heading entitled "Interior Finish," which heading included many other items in addition to painting work required under the Soby subcontract (Tr. 1880).

The record is void as to all of the items included under the term "Interior Finish" on the Eielson project. However, with reference to the Ladd project, the record shows that such item on the government estimate included in addition to painting, hardwood floors, door finishes, doors, milk work, trim, kitchen cabinets, floors and wall coverings, finish hard wood and possibly bathroom accessories (Tr. 1799). Here again, the explanation for the heading "Interior Finish" was given by an employee of appellee and such explanation was never challenged.

Appellants' argument[6] erroneously assumes that the item of "Interior Finish" (Ex. 46(2)) includes only painting, taping and spackling pursuant to the Soby

[6] (App. Br. p. 21).

subcontract. Appellants' argument further erroneously assumes that Soby could have completed the unfinished work on the Eielson project within his contract price. The ultimate erroneous assumption in appellants' argument is that the expenditures found to be necessary by the District Court were actually due to "*outrageous padding, feather-bedding and profiteering, resulting from the collusion of the general contractor and his hand-picked substitute subcontractor, blissfully secure in their knowledge that their platinum-plated performance would come out of the pocket of the appellant, U. S. F. & G., as surety for Soby.*"[7]

Not a single one of the above assumptions is correct.

In addition to appellants' assumptions being wrong, their mathematics are also erroneous.

Appellants allege that "Larsen charged and appellees recovered the sum of approximately $54,000.00, or better than nine times the value of the remaining portion of the contract. . . . "[8] Such an allegation tortures the evidence.

The actual amount paid to Larsen and charged to Soby for Larsen's work was not $54,000.00 as appellants allege but $33,251.06. The total net subcontract costs on the Eielson contract paid by appellees as of August 31, 1956 were $132.292.33 (Ex. II). An examination of the detailed payments and charges as reflected in Exhibits F and I discloses as follows:

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[7] (App. Br. pp. 26, 27).

[8] (App. Br. p. 29).

Amounts paid and billed prior to January 1, 1954	$ 79,448.17	
Miscellaneous items paid or incurred prior to but billed after January 1, 1954	6,382.63	
Cooper's Hardware claim incurred prior to but billed after January 1, 1954	622.01	
TOTAL AMOUNTS INCURRED ON EIELSON BY SOBY PRIOR TO JANUARY 1, 1954		$ 86,452.81
Larsen payroll, taxes and fee	33,251.06	
Miscellaneous materials and expenses after January 1, 1954	1,565.99	
Back charges after January 1, 1954	3,078.36	
TOTAL CHARGES AFTER JANUARY 1, 1954 RESULTING FROM SOBY'S ABANDONMENT		37,895.41
Interest to April 30, 1954	1,363.53	
Interest from April 30, 1954 to August 31, 1956	6,580.58	
TOTAL INTEREST THROUGH AUGUST 31, 1956		7,944.11
TOTAL AMOUNT CHARGED SOBY		132,292.33
Less Total Subcontract Earnings at Completion		78,336.90
APPELLEES' JUDGMENT ON EIELSON CLAIM		$ 53,955.43

Appellees' judgment on the Eielson contract in the amount of $53,955.43 as shown above, does not represent the costs incurred after January 1, 1954 but in fact, as shown on Ex. II, simply represents the difference be-

tween the total charge to Soby ($132,292.33) and the total subcontract earnings to completion ($78,336.90), which included the original subcontract figure, less items deducted from the contract and plus credits given Soby on the N. & A. Cabinet Works account.

Exhibit 46(2), the government progress estimate, does not support appellants' contention that appellees received 73% of the total contract price for completing approximately 8% of the painting contract remaining after Soby left Eielson. This exhibit actually shows $30,552.69 of the painting contract not complete at the time Soby left Eielson. As shown on Ex. 46(2), "Interior Finish" constituted 13.73% of the total prime contract price, which is $346,402.46. This exhibit further shows that on December 31, 1953 there remained incomplete 8.82% of this figure, or $30,552.69. This is 41.48% of the contract price and not approximately 8% as appellants contend.[9]

Max J. Kuney testified fully as to the weight to be given documents such as exhibits 46(1) and 46(2) (Tr. 1554-1562). While appellants now endeavor to ridicule Mr. Kuney's testimony,[10] it is significant that they closed their case without calling any witnesses to refute this testimony. The District Court commented on this omission during the closing arguments (Tr. 1739).

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[9] While "Interior Finish" as previously pointed out, includes items other than painting, it is equally obvious that when less than 10% of "Interior Finish" remains to be completed the incomplete portion is substantially all painting (Tr. 999).

[10] Throughout the trial, and in the present brief, appellants deal very recklessly with figures. For example, at page 27 of their brief they argue that the difference between 95% and 97.85% is quibbling, although the percentage difference refers to $2,176,558.01 and amounts to $62,031.90.

The accuracy of work progress payments was questioned in *Noble v. Stephens,* 108 F.Supp. 217 (D.C. Alaska, 1st Div. 1952) wherein the court ruled against a contractor and a surety, and made short work of the contractor's claim that the cost to finish the work following the breach was excessive. It was there stated:

> "A singular feature is that the work progress payments appear to have greatly exceeded the value of the work, but this point is not strenuously argued, although it is mentioned in the surety's brief. In view of the derelictions referred to, however, the Court cannot find that the plaintiff should have been aware of the disparity between the value of the work done and the payments made, particularly, since the cost of remedying the defective workmanship was shown to be, as is usually the case, wholly disproportionate to the result. Such defects account, at least in part, for the unwillingness on the part of the builders to submit bids for completion of the job."

Appellants contend "simple calculations and common sense show that if appellant Soby had completed the Eielson painting contract, by doing the remaining 8% of the work based upon the agreed contract price, the cost to appellees would have been approximately $5,900.00." [11]

If the Eielson project could have been completed for the sum of $5,900.00, U. S. F. & G. made a serious error in not permitting Soby to continue under that particular subcontract. However, in contrast, U. S. F. & G., after examining the projects in December, 1953, established a reserve of $70,000.00 (Ex. J(a)).

[11] (App. Br. p. 29).

Harold Stenson, the general superintendent for appellees, testified that on December 19, 1953, the Eielson progress of Soby's subcontract was as follows: that building 5303 was about 35% completed; that building 5304 was around 25% completed; that building 5305 was around 20% completed (Tr. 1186).

An examination of the government inspectors' reports, which reports list the buildings and the work being performed therein, together with the number of men working in each trade, is informative and authentic on the extent of the work required to complete the unfinished painting subcontract as of December 19, 1953 (Ex. 36). These reports show 5536 hours of work performed by Larsen's employees subsequent to January 1, 1954, which hours are substantiated by the time cards and the payroll records (Exs. D, E).

When appellees knew Soby had consulted an attorney before Larsen commenced work (Ex. J(a)); when Soby's complaint was filed April 19, 1954, before the projects were concluded (Tr. 13); when two representatives of U.S.F. & G. not only inspected the projects prior to Soby's abandonment, but interviewed Larsen's superintendent and later, with full knowledge of the contract terms, expressly approved the hiring of Larsen (Exs. J, J(a)); when a professional engineer hired by Soby inspected the projects in February, 1954 (Tr. 1636); when none of the witnesses for appellants testified to the charge now made of "feather-bedding, padding and collusion"; when, in addition to the witnesses present at the trial who would have personal knowledge if there was any truth to such charges, no government

personnel or former employees of Soby (including his Eielson foreman) were called as witnesses; when both appellants received weekly statements showing all expenditures and costs, including interest charged, as the projects were being completed; and when no profit or markup for Kuney Johnson Company was charged, it is impossible to impute substance to the inferences now suggested by appellants.

2. Appellees' Reasonable Costs Expended in Completing the Unfinished Work Following Soby's Abandonment Were Not Only Liquidated but Ascertainable as Soon as Such Costs Were Incurred, and the District Court Did Not Err in Awarding Interest on Such Sums.

Appellants now erroneously assume that the costs of completing the unfinished work from and after December 19, 1953, were not liquidated and, therefore, no interest should be allowed appellees prior to the date of Judgment.[12]

Contrary to the contention made in appellants' brief,[13] appellees' cross-complaint was in no way prem-

[12] App. Br. p. 31. The Alaska Statute reads in part: "The rate of interest in The Territory of Alaska shall be six per centum per annum and no more on all moneys after the same become due. . . . " Sec. 25-1-1 Alaska Complied Laws Annotated (1949).

[13] Appellants cite no cases in support of the proposition: "While there are numerous cases involving building contracts, which have permitted interest to be allowed upon the award of damages for deviations or defective performance, it should be noted that all these cases involve claims based upon expressly stipulated contract prices, subject only to changes because of varying additions and deductions. In the present case, on the other hand, the claim upon which interest was allowed, arises out of an alleged breach of contract, whereby the claimant has mitigated his damages by permitting someone else to complete the work required by the contract and now seeks the contract price paid for such completion not as a liquidated claim based upon agreement

ised upon *quantum meruit* but was, in fact, a breach of contract action for Soby's failure to perform his subcontracts (Tr. 34).

In *United States v. United States Fidelity and Guaranty Company,* 236 U.S. 512, 59 L.ed. 696, 35 S.Ct. 298 (1915), a contractor had abandoned his contract with the government for construction of a public building for an entire price. The Supreme Court held that the government was entitled to its actual damages sustained through the contractor's default and in effect, abandonment of the contract. Interest was allowed from the date when, by the terms of the contract, the project should have been completely finished.

15 Am. Jur. Sec. 168, p. 584, "Damages," states:

> "Interest when allowed as damages runs from the date when the right to recover a sum certain is vested in the plaintiff. In actions for breach of contract, it ordinarily runs from the date of the breach or the time when payment was due under the contract."

See also *Puget Sound Pulp & Timber Co. v. O'Reilly,* 239 F.(2d) 607 (9th Cir., 1957).

The reason interest is not allowed on unliquidated damages is because the person liable does not know what sum he owes, and therefore, cannot be in default for not paying. 15 Am. Jur., Sec. 161, p. 580, "Damages."

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between the parties, but as his measure of damages." (App. Br. p. 30, 31).

If this were a correct statement of the law it would mean that after a breach of contract there would have to be "an agreement between the parties" before a claim could be liquidated. This has never been the law on interest as damages.

The record shows that both Soby and U.S.F. & G. received weekly statements from appellees setting forth the actual direct field costs, without overhead, profit or mark-up (Tr. 1504, 1505, Ex. F). Therefore, it is abundantly clear that appellees completion costs were at all times known to and ascertainable by both appellants. The interest due thereon was submitted to the appellants on invoices solely for that purpose under dates of April 30, 1954, and August 31, 1956 (Tr. 45, 46, Exs. F, I).

In *Miller v. Robertson,* 266 U.S. 243, 257, 258, 69 L.ed. 265, 275, 45 S.Ct. 73 (1924) the plaintiff was awarded damages for breach of contract, wherein defendant failed to continue performance and plaintiff was compelled to sell the subject matter of the contract at a reduced price. On the question of interest, the Supreme Court stated:

> "... One who fails to perform his contract is justly bound to make good all damages that accrue naturally from the breach; and the other party is entitled to be put in as good a position pecuniarily as he would have been by performance of the contract ... One who has had the use of money owing to another justly may be required to pay interest from the time the payment should have been made. Both in law and in equity, interest is allowed on money due ...
>
> "In this case at least (from) ... the date of demand, the seller was entitled to have from the buyers the difference between the sum which it would have received prior to that date, if the buyers had kept the contract, and the amount it received on resale ... All damages had accrued prior to the

> demand. There was nothing dependent on any future event. The elements necessary to a calculation of the amount the seller was entitled to have to make it whole . . . were known or ascertainable . . .".

In *Westland Construction Co. v. Chris Berg, Inc.*, 35 Wn.(2d) 824, 835, 215 P.(2d) 683, 690 (1950) a general contractor sued a plastering subcontractor for the increased cost of plastering when the subcontractor failed to perform, together with interest paid by the general contractor on money borrowed. The court allowed the damages and interest saying:

> "Where a contractor refuses to perform his contract, damages may be recovered for the difference between the contractor's bid and the actual cost to the owner of having the work performed by others . . . Likewise, interest on money borrowed by the owner to finance a construction project, accrued while the work is held up by a delay occasioned by the refusal of a contractor to perform, is a proper element of damage . . . ."

The record shows that appellees were paying interest at the rate of six per cent during the performance of the Ladd and Eielson projects (Tr. 1509).

Appellants cite two 1905 cases[14] but acknowledge that the present rule on awarding interest is that it may be allowed even on unliquidated claims if the amount due is capable of being ascertained by computation. However, the two cases cited on this point by appellants, while recognizing that interest can be allowed even on unliquidated claims when ascertainable, deal with

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[14] (App. Br. p. 31).

claims based solely upon *quantum meruit,* and the facts therein are not analogous to the instant case.

Appellants also cite *Columbia Lumber Co., v. Agostino,* 184 F.(2d) 731 (9th Cir. 1950), and apparently contend that since there was a set off allowed in the instant case, the appellees' damages are unliquidated. This decision involved an implied promise to pay a reasonable amount and is not in point. There was held to be no meeting of the minds on the contract price, and therefore, the case clearly was one of *quantum meruit.*

The fact that there is a set off will not defeat the right to interest based upon either a liquidated or ascertainable sum:

> "Where the amount of a claim under a contract is certain and liquidated or is ascertainable, but is reduced by reason of the existence of an unliquidated set off or counter claim thereto, interest is properly allowed upon the balance found to be due from the time it became due and was demanded or suit was commenced therefor . . ." 15 Am. Jur. Sec. 167, P. 584 "Damages."

The correctness of the above ruling is illustrated in *Mall Tool Co. v. Farwest Etc.,* 45 Wn.(2d) 158, 177, 273 P.(2d) 652, 663 (1954), where the court pointed out the inequity of denying interest when a counter claim or set off is alleged:

> "An unliquidated counter claim, even when established, does not affect the right to interest prior to judgment on the amount found to be due on a liquidated or determinable claim, since the debtor may not defeat the creditor's right to interest on such a claim by setting up an unliquidated claim as a set off . . . ."

U.S.F. & G's bond provides for indemnity against "direct or indirect damage that shall be suffered" (Ex. B). Appellees claim was liquidated and ascertainable and the Judgment for interest was the only decision possible under the law.

3. The $3,000.00 Inventory Credit Allowed by the District Court (Increasing the Credit Allowed Soby by Appellees from the Figure of $616.00) Was Well Within the Evidence.

Appellant Soby was unable to produce competent evidence of an inventory for his materials and supplies left on the projects, December 19th, 1953, when he abandoned his contracts (Tr. 499-505).

Because of the lack of evidence presented by Soby, on his case in chief, with respect to the value of the materials and inventory remaining when the contracts were abandoned, the District Court permitted Soby to use appellees' Exhibits S-(1) and S-(2) in estimating the value of the materials and Inventory as listed on these exhibits (Tr. 1694).

Exhibit S-(1) pertained to materials remaining at Ladd and Soby estimated the total value of the items shown on said Exhibit to be $4,829.50. On Exhibit S-(2) which pertained to Eielson, Soby estimated the materials and inventory to be valued at $2,603.25. Therefore, his estimate of the total value of materials, inventory and equipment remaining at both the Ladd and Eielson Projects was the sum of $7,432.75 (Tr. 1694-1695). The $1200.00 value of the pick-up truck listed on this exhibit must be deducted because Soby recovered it (Tr.

1696). In addition, the credit of $2,248.19, evidenced by Exhibit F must be deducted. [15]

When the value of the truck and the credit in Exhibit F is subtracted from Soby's total estimate of the value of items listed on Exhibit S-(1) and S-(2) there remains a total of $3,984.56.

Had the materials and inventory items left by Soby not been used in the completion of the work required, the damage claim of the appellees would have been increased because the identical items would have been needed and purchased by Larsen Brothers Painting Company. This fact was explained by Mr. Kuney (Tr. 1546).

Contrary to the contention made by the appellants that the $3,000.00 setoff is not supported by the evidence, the record shows that Tom Corbett, Larsen's superintendent, estimated the value of the materials left behind by Soby to be $2,391.00 (Tr. 1319). Mr. Kuney testified that it would take at least $3,000.00 worth of brushes, cloths, tools and ladders to properly

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[15] This credit in Exhibit F reads:

"4. Allowance for materials drawn from your job stock and used by us on other work not a part of your sub-contract.

Item	*Quantity*	*Amount*
Sandpaper	263 sheets	$ 32.16
Kitchen enamel	24 gallons	111.60
Joint cement (spackle)	1250 pounds	53.13
Flat wall paint	240 gallons	984.00
Primer-sealer	253 gallons	1,037.30
Joint tape (rolls of 500 feet)	10 rolls	30.00
Total		$2,248.19

"Note: Amounts credited under item 4 were established from the local market prices at Fairbanks, Alaska, at the time the materials were used."

perform the Ladd and Eielson painting subcontracts, but that upon the completion of such work these items would have a value not in excess of $1,200.00 to $1,500.00 to a going concern, and that the amount of $616.00 received by the sale appellees made was not an unreasonable figure under the circumstances (Tr. 1548).

Appellants concede the District Court is free to choose between conflicting evidence. [16] When the painting superintendent, Corbett, estimates the value of the items to be $2,291.00, (and Soby estimates the value to be $3,984.56), and the District Court arrives at the figure of $3,000.00 (the estimate of Mr. Kuney), it would appear the trier of fact was completely within his discretion in arriving at the ultimate figure, and such figure was more than fair to Soby.

Appellants' argument, which in its entirety appears on page 35 of their brief, contains no references to either the Transcript of Record or exhibits, and is merely the conclusion of the author of the brief. Appellants accuse the District Court of pulling "a figure out of a hat," but it would appear appellants are guilty of their own accusation.

CONCLUSION

Inasmuch as the appellants have conceded the weight to be accorded the District Court's Findings of Fact, any citation of authority in support thereof is deemed unnecessary. Neither do appellees deem it necessary to set forth authorities for the rule that the demeanor of

[16] (App. Br. p. 35).

the witnesses and their credibility is a matter for the trial court.

The judgment as to the cost to complete the Eielson sub-contract; the award of interest from September 1st, 1956, to date of judgment; and the inventory credit allowed Soby as a deduction from appellees' judgment on their first cross-complaint relating to the Ladd sub-contract, are supported in every particular by the testimony and exhibits now before this Court.

The judgment should be affirmed in its entirety.

Respectfully submitted,

Paul R. Cressman
Rummens, Griffin, Short & Cressman
Lee Olwell
Olwell & Boyle
Attorneys for Appellees

Paul F. Robison
Of Counsel for Appellees

APPENDIX A—EXHIBITS

Appellants have not complied with Paragraph 2 (f), Rule 18, rules of this court, as amended August 21, 1957. In lieu thereof and to assist the Court, appellees set forth a tabular index of those exhibits to which reference is made in appellants' opening brief and in appellees' brief. It will be noted that the record, as printed, does not indicate at what stage of the proceedings defendants' Exhibits I, S (1), and S (2) were admitted. It should be noted that the entire record was not printed and the three exhibits referred to each bear the stamp of the Clerk of the District Court, indicating that such exhibits were admitted in evidence.

Exhibit No.	*Identified*	*Offered*	*Received*
Pls' 1 (1)	Tr. 20	Tr. 20	Tr. 20
Pls' 2 (2)	Tr. 20	Tr. 20	Tr. 20
Pls' 13	Tr. 20	Tr. 20	Tr. 20
Pls' 36	Tr. 22	Tr. 22	Tr. 23
Pls' 46 (1)	Tr. 1197	Tr. 1197	Tr. 1197
Pls' 46 (2)	Tr. 1197	Tr. 1197	Tr. 1197
Defs' A	Tr. 22	Tr. 22	Tr. 22
Defs' B	Tr. 22	Tr. 22	Tr. 22
Defs' C	Tr. 22	Tr. 22	Tr. 22
Defs' D	Tr. 22	Tr. 22	Tr. 22
Defs' E	Tr. 22	Tr. 22	Tr. 22
Defs' F	Tr. 22	Tr. 22	Tr. 22
Defs' G	Tr. 22	Tr. 22	Tr. 22
Defs' H	Tr. 22	Tr. 22	Tr. 22
Defs' I	Tr. 22		
Defs' J	Tr. 22	Tr. 22	Tr. 22
Defs' J (a)	Tr. 22	Tr. 22	Tr. 22
Defs' S (1)			
Defs' S (2)			

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Pls' 13	Tr. 20	Tr. 20	Tr. 20
Pls' 36	Tr. 22	Tr. 22	Tr. 23
Pls' 46 (1)	Tr. 1197	Tr. 1197	Tr. 1197
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Defs' C	Tr. 22	Tr. 22	Tr. 22
Defs' D	Tr. 22	Tr. 22	Tr. 22
Defs' E	Tr. 22	Tr. 22	Tr. 22
Defs' F	Tr. 22	Tr. 22	Tr. 22
Defs' G	Tr. 22	Tr. 22	Tr. 22
Defs' H	Tr. 22	Tr. 22	Tr. 22
Defs' I	Tr. 22		
Defs' J	Tr. 22	Tr. 22	Tr. 22
Defs' J (a)	Tr. 22	Tr. 22	Tr. 22
Defs' S (1)			
Defs' S (2)			

Exhibit No.	*Identified*	*Offered*	*Received*
Defs' CC	Tr. 1404	Tr. 1404	Tr. 1404
Defs' DD	Tr. 1420	Tr. 1421	Tr. 1421
Defs' EE	Tr. 1423	Tr. 1424	Tr. 1425
Defs' II	Tr. 1505	Tr. 1505	Tr. 1505
Defs' JJ	Tr. 1505	Tr. 1511	Tr. 1511

APPENDIX B

MOTION FOR ATTORNEYS' FEES ON APPEAL

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERIC SOBY, d/b/a Soby Painting Co., and UNITED STATES FIDELITY AND GUARANTY COMPANY, *Appellants*, vs. LLOYD W. JOHNSON and MAX J. KUNEY, d/b/a Kuney Johnson Company, *Appellees*.	No. 15823

TO THE HONORABLE, THE JUDGES OF SAID COURT:

COME NOW the appellees and respectfully move for an allowance for services rendered by their attorneys on this appeal.

This motion is based upon the records and files herein, together with the legal authority cited in appellees' brief and the affidavit of counsel hereunto attached.

WHEREFORE, appellees respectfully pray that this honorable court award them attorneys' fees on appeal herein.

Respectfully submitted,

LEE OLWELL
PAUL R. CRESSMAN
Attorneys for Appellees

STATE OF WASHINGTON }
} ss.
COUNTY OF KING }

PAUL R. CRESSMAN and LEE OLWELL, each being first duly sworn upon oath, depose and say:

That they are the attorneys for the appellees herein

and hereby make this affidavit in support of the Motion for Attorneys' Fees on Appeal above set forth.

The appeal in this case has been pending since May 2, 1957. Since that date and including the completion of appellees' brief herein, appellees' attorneys have expended the following hours during the years indicated below on matters directly connected with this appeal.

	1957	1958	1959	Total
Paul R. Cressman	16⅔	22½	147½	185½
Other Attorneys Associated with Rummens, Griffin, Short & Cressman	14	3⅚	17⅓	35⅙
Lee Olwell	10	24	97	131
	40⅔	50⅙	261⅚	352⅔

GRAND TOTAL OF HOURS 352⅔

Prior to the oral argument, appellees' attorneys will file a supplemental affidavit stating further the number of hours expended by them on this appeal subsequent to the filing of this brief.

That they have read the foregoing motion, know the contents thereof and hereby declare under the penalty of perjury that the matters and facts there set forth are true and correct to the best of their personal knowledge.

Paul R. Cressman

Lee Olwell

Subscribed and sworn to before me this 2d day of July, 1959.

Kenneth P. Short

Notary Public in and for the State of Washington, residing at Seattle

APPENDIX C

AUTHORITIES IN SUPPORT OF MOTION FOR ATTORNEYS' FEES ON APPEAL

The Act of Congress, 31 Stat. 321, Ch. 786 (June 6, 1900) entitled "Act Making Further Provisions for a Civil Government for Alaska, and for other Purposes," Section 509 provides as follows:

"Measure and Mode of compensation of attorneys should be left to the agreement, express or implied, of the parties; but there may be allowed to the prevailing party in the judgment certain sums by way of indemnity for his attorneys fees in maintaining the action or defense thereto, which allowances are termed costs." This provision was codified by the Alaska Territorial Legislature, A.C.L.A. Sec. 55-11-51 (1949).

The rule is well established that when a state or territorial statute allows attorneys fees to be taxed as costs, Federal Courts sitting in that jurisdiction will abide thereby. *Phoenix Indemnity Company v. Anderson's Groves, Inc.,* 176 F.(2d) 246 (5th Cir. 1949); *Willard v. Serpell,* 62 Fed. 625 (1894).

Pursuant to the above law, the District Court in the instant case awarded appellees $10,000.00 for attorneys fees to the date of judgment (Tr. 95).

As was stated in *American Can Co. v. Ladoga Canning Co.,* 44 F.(2d) 763 (1903):

> "The District Court, however, could not and doubtless would not, take into consideration the uncertain factor of a possible appeal, nor the legal services which might be rendered in case an appeal was prosecuted. Since the judgment was entered in the District Court, defendant has taken this appeal, and plaintiff's attorneys have rendered additional necessary and substantial legal services. . . ."

"The statute authorizing plaintiff's recovery of reasonable attorneys' fees directs their inclusion as a part of the costs. We find nothing in this statute which limits this allowancee to services rendered in the District Court. Its terms are broad enough to include plaintiff's reasonable attorney's fees necessarily incurred in any court wherein the cause was pending."

For cases wherein a Circuit Court of Appeals has awarded attorneys' fees on appeal in situations analagous to the instant case see:

Salmon Bay Sand & Gravel Co. v. Marshall, 93 F.(2d) 1 (9th Cir. 1937);

Radcliff Gravel Co. v. Henderson, 138 F.(2d) 549 (5th Cir. 1943);

Louisville & N. R. Co. v. Dickerson, 191 Fed. 705 (6th Cir. 1911).